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No. 1077

In the Supreme Court of the United States

OCTOBER TERM, 1966.

ERNEST MALLORY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.

ERNEST MALLORY,

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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Ernest Mallory, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT AND OPINION OF THE COURTS BELOW:

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on April 14, 1966, and is not reported, but appears in the record with and certified by the Clerk of the Court of Appeals for the Seventh Circuit and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit affirming said judgment was entered on January 5, 1967, and has not been reported in the Federal Reporter as yet, but is set forth in the appendix hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on January 5, 1967. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

I.

Whether a trial abuses its discretion in commenting on a defendants criminal record and comparing it with the absence or lack of criminal records on the part of the government's witnesses prior to finding the defendant guilty?

II.

Whether the conflicting and contradictory, testimonies of the government's two chief witnesses have the effect of negativing each other resulting in a failure of the government to prove the defendant guilty beyond a reasonable doubt?

STATUTES INVOLVED

The statutory provisions involved are Title 26, U.S.C., Section 4705(a), Internal Revenue Code of 1954; and Title 21, U.S.C., Section 174.

STATEMENT OF THE CASE

On December 30, 1965, a two-count indictment was returned against Ernest Mallory in the Northern District of Illinois. The first count charged him with unlawfully selling, bartering, exchanging and giving away approximately 17,411 grams of heroin, a narcotic drug, to Earl Jackson on February 26, 1965, not in pursuance of a written order from the said Carl Jackson on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, in violation of the United States code, Section 4705(a), Internal Revenue Code of 1954.

Count II charged the defendant with fraudulently and knowingly receiving, concealing, buying, selling and facilitating the transportation, concealment and sale of approximately 17.411 grams of heroin, a narcotic drug, after it had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States, contrary to law; in violation of Title 21, U.S.C., Section 174.

On February 14, 1965, Defendant Mallory entered a plea of not guilty.

On April 13, 1966, the defendant waived trial by jury, and on April 14, 1966, defendant was found guilty, by Judge Richard B. Austin, under both counts of the indictment. On May 24, 1966, the defendant was sentenced to a term of seven (7) years on each count, said sentence to run concurrently with each other, and a fine of One Thousand Dollars ($1,000.00) was ordered.

REASONS FOR GRANTING THE WRIT

A FEDERAL JUDGE MAY NOT COMPARE DEFENDANT'S CRIMINAL RECORD WITH GOVERNMENT WITNESSES' LACK OF CRIMINAL RECORDS WHEN DOING SO PRIOR TO FINDING DEFENDANT GUILTY INFERS THE FINDING IS NOT JUSTIFIED SOLELY BY THE EVIDENCE.

The trial judge, prior to finding the defendant guilty, made the following statement: "I have a choice here of believing the two agents and Dorothy Mae Jones, who according to the record, have no felony records and that of your client, who has a triple felony record." This statement from the bench implies that the judge found the defendant, guilty, not from the evidence, but because he had prior convictions for burglary. If this is to be the accepted policy of the courts, a defendant cannot receive a fair trial if he has a prior record. In a narcotics case, such a defendant is at the mercy of any narcotics offender, who after having been arrested can avoid having a criminal record by working as a government informer. This is why Dorothy Mae Jones has no record. As long as she works as an informer and testifies in a manner that makes conviction of the defendant a certainty, she will never acquire a criminal record because the crimes for which she is arrested will never result in convictions against her.

Regarding the federal agents, it is evident that a prerequisite for their employment is the absence of a criminal record. Therefore, for a trial judge to comment on such a fact, and compare the agents lack of criminal record with the defendant's criminal record is indicative of the court's prejudice and constitutes a denial of a fair trial to the defendant.

The cases cited by the government in its brief are not in point with the petitioner's argument. In *U. S.* v. *Senior*, 274 F.2d 613, 616 (7th Cir., 1960) and *Daniel* v. *U. S.*, 268 F.2d 849 (5th Cir., 1959), the courts held, "to show that a witness has been convicted of a felony is a well established method of impeachment", and "the trier of fact has the duty of determining what weight, if any, to give to this prior record as impeachment.

In these cases the only inference was to defendant's records and not to the absence of or lack of records of government witnesses, who, because of their known and apparent occupations, could not possibly have criminal records. The only inference that can be drawn from such an unfair comparison is that the decision was not determined from evidence of the defendant's guilt beyond a reasonable doubt.

II.

The conflicting and contradictory testimonies of the Government's two Chief Witnesses have the effect of negativing each other and resulting in a failure of the government to prove the defendant guilty beyond a reasonable doubt.

The government produced two witnesses who claimed they participated in the crime (as buyers of heroin) and therefore (they) were eye-witnesses. One, Agent Jackson, would have you believe that he gave the defendant $500.00 for heroin although he and the defendant had never seen each other before and were not introduced on this occasion. This defies credibility. Dorothy Mae Jones, the other key witness, admitted that she is not only a narcotic peddler but also a narcotic addict. She would have the court believe her testimony although she admitted that she had been arrested by the same agent Jackson for selling nar-

cotics. The witness Jones further testified that she expected a favorable disposition of her own case if Mallory, the defendant here, should be convicted in the instant case.

The testimony of Agent Jackson and Dorothy Mae Jones revealed numerous discrepancies. The statements made by Dorothy Mae Jones, under oath, relative to her having been arrested by Agent Jackson for selling narcotics in 1955 and having known Agent Jackson for ten years were in direct contradiction to Agent Jackson's testimony in which he stated he had only known Dorothy Mae Jones for one and a half years.

In further contradiction of each other, Agent Jackson testified that he had used Dorothy Mae Jones as an informer prior to this time; however, Dorothy Mae Jones testified that prior to February 26, 1965, she had never worked as an informant for Agent Jackson.

Dorothy Mae Jones testified that except for going to the Office of the Federal Bureau of Narcotics on the evening of February 26, 1965, she had never been there before; however, Agent Jackson, in his official written reports (Government's Exhibits 3500-1 and 3500-2), stated that he had met with the informant (Dorothy Mae Jones) at the Federal Bureau of Narcotics office on the morning of February 26, 1965, and at which time and place, the informant told him she could make a purchase of heroin. Agent Jackson further testified the report was true and correct.

The effect of such discrepancies negatives the effect of each witnesses' testimony so that neither is credible.

To sustain the finding of guilty in the lower courts this court must believe that there was substantial and credible evidence before the courts. There must be an exclusion of

every other hypothesis except that of guilt; the presumption of innocence obtains; not only does the presumption of innocence obtain but it starts at the commencement of the trial but it remained operating in favor of the defendant throughout the trial; the presumption of innocence alone is enough, is sufficient for an acquittal; the guilt of the defendant must be shown beyond a reasonable doubt; such conviction cannot be based upon suspicion; the facts established must be consistent with guilt, and inconsistent with "every reasonable supposition of his innocence"; the jury must (the judge here) acquit if the facts are consistent with innocence as they are with guilt, the burden is always upon the prosecution to prove the defendant's criminal act, and intent to commit crime beyond a reasonable doubt. These truisms need no citation of authority but they have, in fact, been collected in the cases of, *U. S.* v. *Schneiderman,* (1952), U.S.D.C., S. D. Cal.) 106 F. Supp. 906; *U. S.* v. *Foster* (U.S.D.C., S. D., N.Y.), 9 F.R.D. 367, affirmed 183 F.2d 201, affirmed 95 L. ed. 439; *U. S.* v. *Frankfeld,* 103 F. Supp. 48, affirmed 198 F.2d 679.

CONCLUSION

We Importune This Honorable Court to Grant Its Writ of Certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, January 18, 1967

Before

Honorable WIN. G. KNOCH, *Circuit Judge.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. No. 15771. ERNEST MALLORY, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the motion and affidavit of counsel for defendant-appellant.

It is ordered that the issuance of the mandate of this Court be stayed to and including February 26, 1967, in accordance with the provisions of Rule 28 of the Rules of this Court.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 5th, 1967

Before
Hon. WIN G. KNOCH, *Circuit Judge.*
Hon. LATHAM CASTLE, *Circuit Judge.*
Hon. THOMAS E. FAIRFIELD, *Circuit Judge.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
No. 15771.
ERNEST MALLORY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This Court has considered the record in this case transmitted to this Court by the District Court, in addition to the briefs filed by the respective parties herein, *and has heard oral argument in open court by counsel for the said parties.* Having taken the case under advisement for decision, the Court has conferred thereon and is now of the opinion, and accordingly holds and adjudges, that the judgment from which this appeal was taken is supported by the record herein and the law appertaining thereto.

Wherefore, *the judgment from which this appeal was taken is affirmed,* and the Clerk of this Court is directed to enter the judgment of this Court accordingly.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1077

ERNEST MALLORY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a trial to the court, a jury having been waived (A. 4),[1] petitioner was convicted (A. 40) in the United States District Court for the Northern District of Illinois on both counts of a two-count indictment (A. 2–3) charging him with having sold heroin without a written order on the prescribed form (count 1) and with having received and concealed the same heroin with knowledge that it had been illegally imported (count 2), in violation of 26 U.S.C. 4705(a)

[1] The record filed with the petition for a writ of certiorari consists of the excerpts from the trial transcript contained in the appendices to petitioner's and the government's briefs in the court of appeals ("A." and "G.A.", respectively) and the proceedings in that court ("C.A.R.").

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and 21 U.S.C. 174, respectively. On May 24, 1966, he was sentenced to seven years' imprisonment on each count, to run concurrently, and fined $1,000 (A. 42–43). On January 5, 1967, the court of appeals affirmed, *per curiam* (C.A.R. 1; Pet. App. 2a). The petition for a writ of certiorari, filed February 18, 1967, is out of time under Rule 22(2) of the Rules of this Court. Further review is, in any event, unwarranted.

The evidence adduced by the government established that, on February 26, 1965, petitioner offered to sell five "spoons" of heroin to Dorothy Jones, a confidential informant of the Federal Bureau of Narcotics, for $500 (A. 7, 23–24). That evening, following communication of this information by Miss Jones to the Narcotics Bureau, Narcotics Agent Carl Jackson, posing as an associate of Miss Jones, delivered $500 to petitioner in the vestibule of Miss Jones' apartment house (A. 7, 9–11, 17, 20, 24–25). Petitioner, after counting the money, told the agent to tell Miss Jones to meet petitioner in a short while at a designated tavern in the vicinity to pick up the heroin (A. 10–11, 17–18). An hour later, at the tavern, petitioner delivered the heroin to Agent Jackson in the presence and at the direction of Miss Jones (A. 11–12, 25–26).

A second narcotics agent, David Connelly, testified that he had observed petitioner enter Miss Jones' apartment house at about the time that Agent Jackson, according to the latter, delivered the purchase money to petitioner (G.A. 2–3).

Petitioner, testifying in his own behalf, denied the testimony of Miss Jones and the two agents and stated that he did not even know Miss Jones (A. 37–38). He acknowledged on cross-examination that he had a record of three burglary convictions (G.A. 3–4).

1. There is no merit in petitioner's contention (Pet. 4–5) that it was unfair for the trial judge, in evaluating the credibility of petitioner and the government witnesses, to take into account the fact that petitioner had "a triple felony record," whereas the government witnesses had no criminal records (Pet. 4; G.A. 4). It is well settled that the finder of the facts (whether it be the judge or a jury) may consider a witness' criminal record in weighing his testimony. *E.g., Daniel* v. *United States,* 268 F. 2d 849, 852 (C.A. 5); *United States* v. *Senior,* 274 F. 2d 613, 616 (C.A. 7). There is no warrant for the claim that petitioner was found guilty "because" of his prior convictions (Pet. 4).

2. Nor is there substance to petitioner's argument that the evidence is insufficient to support the verdict because of discrepancies in the testimony of the two principal government witnesses, Miss Jones and Agent Jackson (Pet. 5–7). The asserted conflicts relate not to details of the offense concerning which the witnesses testified, but to such peripheral matters as how long Miss Jones and the agent had known each other and whether Miss Jones had previously acted as a confidential informant of the officer (Pet. 6). Such discrepancies—to the extent that there were

any[2]—presented, at most, issues of credibility for the trial judge to resolve.

[2] The record does not unequivocally reflect any of the alleged discrepancies (see Pet. 6). With respect to how long Agent Jackson and Miss Jones had been acquainted, the agent stated that he had known her for about a year and a half prior to the date of the offense involved here (February 26, 1965), their acquaintance apparently beginning when the agent arrested her on a narcotics charge (A. 13, 17). Miss Jones' testimony, on cross-examination, also indicated that their acquaintance began with her arrest but revealed confusion over the date. She stated variously that the arrest was made "[a]round '56," that she had "made a mistake" and "was thinking about something else," and that it occurred "in '55, I believe." When defense counsel then suggested that she must have "known Agent Jackson for quite a few years," however, she replied, "Well, I wouldn't say quite a few years, but I have known him." Her final testimony on the point was that she had known him "longer than a month" (A. 31).

Contrary to petitioner's assertion, Agent Jackson's testimony did not contradict Miss Jones' statement that her only visit to the Narcotics Bureau office was the *evening* of February 26, 1965 (A. 27, 31–32). He testified, on direct examination, that he spoke with her by telephone that morning (A. 7). On cross-examination, he acknowledged that he had stated in his official report that he had "met with" the informant at his office on the morning in question (A. 18–19). His present recollection, however, was that it "was a telephone call," although he agreed, in light of the report, that it was "quite possible" that he had met with her in person (A. 19).

It is true that, while Agent Jackson testified that he had used Miss Jones as an informant prior to petitioner's offense (A. 17), she denied any such earlier role (A. 32). Immediately prior to the denial, however, she stated, in response to the question whether she had previously worked as an informant for the agent, "No, *only when they arrested me*" (*ibid.*; emphasis supplied). It is thus at least doubtful that Miss Jones meant to deny categorically that she had ever previously served as an informant.

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted.

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